Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1994

JOSEPH M. PERSINGER, on behalf of himself and all other shareholders of Persingers Incorporated, a West Virginia corporation,

Petitioner,

v.

R. FRANK CARMAZZI, SALES ONE, INC., SALES TWO, INC., JOHN C. MORTON, W. GUY WILES, JR., WILLIAM M. TANTLINGER, ESQ., PERSINGERS INCORPORATED, WILLIAM F. AGEE, and BANK ONE, HUNTINGTON, WEST VIRGINIA, N.A. (FORMERLY, THE FIRST HUNTINGTON NATIONAL BANK, N.A.),

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Fourth Circuit (Court of Appeals), in its June 29, 1994 unpublished, one-paragraph, per curiam opinion, abdicate its judicial authority by adopting in toto, the opinion of the Supreme Court of West Virginia in response to a referral of state law questions,

(a) where there were overriding federal due process questions presented to the Court of Appeals, which were mature for decision and which were dispositive of the appeal then pending before it, and

(b) where the referral of "questions of law to be answered" effectively converted the West Virginia Supreme Court into a court of appeals with respect to findings of fact and conclusions of law previously adjudicated after trial by a U.S. District Court Judge, and adopted in a prior opinion of the U. S. Court of Appeals.

2. Does the "business purpose doctrine", struck down by the West Virginia Supreme Court, and held invalid by the Fourth Circuit's adoption, without qualification of the West Virginia Supreme Court's opinion, in conflict with the holdings of the Fifth and Eleventh Circuits, permit a majority stockholder to cause a merger transaction solely for the purpose of cashing out minority shareholders.

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JOSEPH M. PERSINGER, on behalf of himself and all other shareholders of Persingers Incorporated, a West Virginia corporation,

Petitioner,

v.

R. FRANK CARMAZZI, SALES ONE, INC., SALES TWO, INC., JOHN C. MORTON, W. GUY WILES, JR., WILLIAM M. TANTLINGER, ESQ., PERSINGERS INCORPORATED, WILLIAM F. AGEE, and BANK ONE, HUNTINGTON, WEST VIRGINIA, N.A. (FORMERLY, THE FIRST HUNTINGTON NATIONAL BANK, N.A.),

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Joseph M. Persinger, on behalf of himself and all other shareholders of Persingers Incorporated (PI), a West Virginia corporation, respectfully prays that a writ of certiorari issue to review the judgment of the

United States Court of Appeals For the Fourth Circuit ("Court of Appeals") entered in this proceeding on June 29, 1994, with respect to which petitioner's timely filed petition for rehearing and suggestion for rehearing en banc were denied on July 26, 1994.

OPINIONS BELOW

The unpublished, per curiam opinion of the Court of Appeals decided June 29, 1994 and its order denying petitioner's petition for rehearing and suggestion for rehearing en banc entered July 26, 1994 are set forth in the Appendix hereto ("App.") at pages 1-9.

The opinion of the Supreme Court of Appeals of West Virginia ("W.Va. Supreme Court") decided February 17, 1994, Persinger v. Carmazzi, is reported at 441 S.E.2d 646 (W.Va. 1994) and is at App. 10-54.

The order of certification of the Court of Appeals to the W.Va. Supreme Court entered on June 18, 1993 and the amended order of

certification entered August 16, 1994 are at App. 55-116.

The memorandum opinion and order of the United States District Court for the Southern District of West Virginia ("District Court") (Haden, Chief Judge) entered June 22, 1992 are at App. 117-141.

The order of the District Court (Haden, Chief Judge) entered June 1, 1992 is at App. 142.

The order of the District Court (Haden, Chief Judge) entered June 1, 1992 is at App. 143-236.

The order of the District Court (Haden, Chief Judge) entered March 25, 1992 is at App. 237.

The order of the District Court (Haden, Chief Judge) entered March 24, 1992, is at App. 238.

The order of the District Court (Haden, Chief Judge) entered February 26, 1992 is at App. 239-241.

The order of the District Court (Haden, Chief Judge) entered December 11, 1991 is at App. 242-245.

The order of the District Court (Knapp, Senior Judge) entered July 23, 1991 is at App. 246-247.

The order of the District Court (Knapp, Senior Judge) entered January 29, 1991 is at App. 248-251.

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The order of the District Court (Knapp, Senior Judge) entered March 1, 1989 is at App. 279-284.

The order and memorandum opinion of the District Court (Knapp, Senior Judge) entered December 29, 1988 and January 5, 1989 respectively are at App. 285-331.

The order of the Court of Appeals entered July 15, 1988 is at App. 332-333.

The order of the District Court (Knapp, Senior Judge) entered June 28, 1988 is at App. 334-335.

The order of the District Court (Knapp, Senior Judge) entered April 12, 1988 is at App. 336-341.

The order of the District Court (Knapp, Senior Judge) entered July 17, 1987 is at App. 342-343.

The order of the District Court (Knapp, Senior Judge) entered June 17, 1987 is at 344-345.

The order of the District Court (Knapp, Senior Judge) entered May 19, 1987 is at App. 346-350.

All citations in this petition will be to the opinions as reproduced in the Appendix hereto ("App.") at pages 1-350.

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1994. The petitioner's timely filed petition for rehearing and suggestion for rehearing en banc were denied by order of the Court of Appeals on July 26, 1994. This petition is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Petitioner, plaintiff below, is a citizen of the State of New Jersey; respondents, defendants below, were at the time each citizens of West Virginia. The amount in controversy exclusive of interest and costs exceeds $10,000.00. The basis for jurisdiction in the United States District Court for the Southern District of West Virginia was diversity of citizenship, 28 U.S.C. 1331 and 1332(a), federal securities law questions under 15 U.S.C. 78(a), and pendent jurisdiction over petitioner's state law claims.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND CORPORATION BYLAW INVOLVED

The constitutional and statutory provisions and the corporation bylaws involved in the case are as follows:

(i) Constitution of the United States, Amendment V.

(ii) West Virginia Code of 1931, as amended July 1, 1974, Acts of the 61st W.Va. Legislature, Ch. 13, §31-1-1 et seq., Regular Session (1974)

Sec. 31-1-19. Notice of shareholders' or members' meetings.

Sec. 31-1-22. Vacancies in board of directors; et cetera.

Sec. 31-1-24. Place and notice of directors' meetings.

Sec. 31-1-34. Procedure for merger.

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Sec. 31-1-37. Effect of merger or consolidation; et cetera.

Sec. 31-1-83. Rights of corporation to acquire and dispose of its own shares.

Sec. 31-1-122. Right of shareholders to dissent.

Sec. 31-1-123. Rights of dissenting shareholders; et cetera.

(iii) Persingers Incorporated Bylaws (3/1/86) Section 5.4. Purchase of Stock.

The pertinent texts of these materials are set forth at App. 351-388.

STATEMENT OF THE CASE

Summary

This petition involves the tale of how a newly appointed President of a small, closely-

held corporation, aided and abetted by the officers, directors, goes from an employee owning less than 1% of the stock of the corporation to Chairman of the Board owning 100% of the stock in a few short months utilizing the phenomenon of a leveraged buy-out followed by a "squeeze out" merger whereby all of the other stockholders of the corporation are thrown out at a dictated price.

In the process, the President tampers with the bylaws of the corporation and utilizes the funds of the corporation to further his LBO plans, all the while concealing these acts from unsuspecting shareholders.

In short, this is a story about unadulterated greed, about how that greed overrides ethical constraints and, ultimately, about violation of the law.

HISTORY OF PERSINGERS INC. 1904-1986

1904 Founding of Company by Moses Persinger

In 1904, Moses Persinger, grandfather of petitioner Joseph M. Persinger, began the business of Persinger Supply Company in Williamson, West Virginia. The business was initially a supplier of hardware and later mining materials.

1941 Opening of Heavy Equipment Branch

In 1941 a branch of Pesinger Supply Company was opened in Charleston, West Virginia by Meredith Persinger, General Manager of the Charleston branch, as a seller of heavy equipment for the construction industry. and as a dealer for tractors. In 1942 the tractors of Persinger Supply Company were sent to Russia, and Meredith Persinger was sent to the United States Army.

1946 Incorporation of Business

Returning from the war, Meredith Persinger was appointed the General Manager of Persingers Inc., which had been incorporated by his older brother, Arthur, and others, and to which the assets of

the Charleston branch of Persinger Supply Company had been sold.

1964 Meredith Persinger Becomes President

In 1964 Meredith Persinger succeeded to the presidency of Persingers Inc. upon the death of Arthur Persinger. Arthur's son, John A. Persinger, was elected to the board, and his widow inherited Arthur's 48% block. John A. was president of his own machinine company in Huntington, West Virginia, and, while a conscientious director of Persingers Inc., was never active in the day-to-day business. Upon his mother's death in 1981, John A. inherited the 48% block of stock.

Between 1946 and 1985, Meredith Persinger took the corporation, which had been incorporated with a capital of $100,000, to a corporation with audited assets of $4.2 million, no long term liabilities, short term liabilities of $321,000, and shareholder equity of $3,900,000, of which retained earnings

constituted $2,700,000 and cash and marketable securities constituted $1,200,000.

Carmazzi and Executor in Control 1985-1986

1985 Carmazzi Made President

In March 1985 Meredith Persinger was made Chairman of the Board, and R. Frank Carmazzi was made President. In 1984 Carmazzi had bought 40 shares of stock at a price of $100 per share.

Death of John A. Persinger

One month later, John A. Persinger died, and his executor, The First Huntington National Bank, N.A. (now Bank One, Huntington, West Virginia, N.A.) came into control of the 48% block of stock.

This action arises out of the actions of Mr. Carmazzi, and the other respondents, following John A. Persinger's death culminating in a "cash-out" merger consummated on May 29, 1987.

Prior to the merger, as of December 31, 1986, Mr. Carmazzi had been one of 46 shareholders of Persingers Inc. He owned 40 (out of

11,570) shares of its common stock, representing less than 1%. The book value of his shares was approximately $14,000.00. Upon consummation of the merger, Mr. Carmazzi became the sole shareholder and owner of Persingers Inc. After taking into account debt of approximately $1,500,000.00 incurred to carry out the transaction, which became a liability of Persingers Inc. through the merger, its shareholders equity was approximately $1,100,000.00 at book value. (App. 321-322 paragraph ["¶"] 53). The merger has thus resulted not only in the elimination of all other shareholders but also in a personal gain for Mr. Carmazzi in excess of $1,000,000.00.

This merger was accomplished despite the existence (until repealed by respondents without notice at the Persingers Inc. 1987 annual shareholders' meeting on March 7, 1987 as an admitted part of Mr. Carmazzi's plan), of a bylaw of Persingers Inc. (sec. 5.4) which (i) prohibits any purchases of Persingers Inc.'s stock by an

officer or director unless the corporation shall first have the opportunity to make the purchase for its own treasury, (ii) provides that any officer or director who negotiates for the purchase of Persingers Inc. stock shall be deemed to be negotiating on behalf of the corporation, and (iii) provides further that any officer or director who purchases shares without complying with the bylaw conclusively deemed to have purchased such shares on behalf of Persingers Inc. (App. 383-388)

This merger was accomplished despite an undisclosed letter of intent agreement between all respondents (other than Tantlinger) dated January 9, 1987, for the purchase of a bloc of 5,592 shares of Persingers Inc. common stock (forty-eight (48%) percent of shares outstanding), owned by the estate of John A. Persinger (the "John Persinger estate bloc" or "estate bloc"). Under bylaw sec. 5.4, Persingers

Inc. had the right to purchase the estate bloc pursuant to this agreement.

This merger was accomplished despite a higher purchase offer made by petitioner on May 27, 1987, to purchase (i) the John Persinger estate bloc for $285.00 per share, and (ii) any or all shares of Persingers Inc. from any shareholder electing to sell for $300.00 per share.

Finally, this merger has been allowed to stand despite a December 29, 1988 Order and January 5, 1989 Memorandum Opinion (collectively, the "rescission order"), entered by a United States District Court judge after a 1987 consolidated bench trial on petitioner's counts for preliminary injunction and for permanent injunction or rescission of the merger. The rescission order held that (i) respondents Carmazzi, Morton and Wiles, had violated Persingers Inc. bylaw sec. 5.4 in connection with the merger by the January 9, 1987 agreement; (ii)

because the John Persinger estate bloc was purchased in violation of Persingers Inc. bylaw sec. 5.4, it was not lawfully held and could not lawfully be voted in favor of the merger, and accordingly the merger was not approved by the requisite majority vote; (iii) respondents Carmazzi, Morton, Wiles and Tantlinger had failed to properly protect Persingers Inc. minority shareholders when they failed to consider and act upon petitioner's offer or other alternatives to the merger; and (iv) that the effect of the merger was equivalent to a sale of the assets of Persingers Inc. to Mr. Carmazzi for inadequate consideration. Concluding that it would be "unconscionable" that the action taken by the stockholders and directors [the respondents] should be approved, the trial judge ordered that the merger be rescinded and held for naught. (App. 285-331)

In the rescission order, Senior United States District Court Judge Dennis R. Knapp (the

"trial judge") entered fifty-three (53) findings of fact and ten (10) conclusions of law. (App. 285-331) Pursuant to the page limits of Rule 33 of this Court, petitioner summarizes the facts as follows.[1]

Persingers Inc. was incorporated in 1946 and is engaged in the sale of mining and industrial machinery and supplies. As of December 31, 1986, it had audited assets of $4,240,000.00, current liabilities of $321,000.00, no long term liabilities, and shareholders equity of $3,919,000.00. Its retained earnings were $2,791,000.00, and its invested cash and marketable securities were $1,500,000.00. Included in its assets were real estate and buildings stated at their cost less accumulated depreciation. There were 11,570 shares of common

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[1]Citations to the relevant volume and page numbers of the Joint Appendix filed with the Court of Appeals on September 1, 1992 are in the following form (V. __, A___). Citations to the relevant volume and page numbers of the Transcript of the 1987 consolidated trial held May 20, 1987 - June 15, 1987 are in the following form (Trial Tr. dtd. _____, pp. ____).

stock outstanding, with a book value of $338.00 per share. (V.4, A1122)

Petitioner, son of Meredith Persinger, and the brother of Thomas Persinger, was the owner of 76 shares of Persingers Inc. prior to the merger, but was neither an officer nor director. Prior to the merger, petitioner's family (sometimes referred to as the "Persinger group") owned 1,267 shares, or 10.9% of Persingers Inc.'s stock. Prior to his death on March 8, 1985, John A. Persinger, Meredith Persinger's nephew and petitioner's cousin, owned 5,592 shares (48% of Persingers Inc.'s stock), constituting the John Persinger estate bloc.

Respondents Carmazzi, Morton and Wiles owned a total of 786 shares or 7% of Persingers Inc. stock.

Appointment of Executor Bank's V.P. to Board

After John Persinger's death, The First Huntington National Bank, now Bank One, Huntington, W. Va. ("Bank One"), qualified as

executor of his estate. On September 17, 1985 at a special shareholders' meeting, respondent Agee was elected as a director of Persingers Inc. to fill the vacancy created by his death. (App. 289-290, ¶ 9)

1986 Adoption of Corporate Opportunity Bylaw

On February 10, 1986, Mr. Carmazzi gave notice to the Persingers Inc. shareholders that adoption of a new set of bylaws was to be considered at an annual meeting on March 1, 1986. Included in the new bylaws was sec. 5.4, restricting purchases of shares by directors and officers "as a protection for the shareholders." (V.4, A1013) At the meeting, these new bylaws were adopted. (App. 291)

Bylaw sec. 5.4 (the "bylaw") stated that it was the policy of Persingers Inc. to purchase any of its shares as may become available, subject to board approval of the terms. The bylaw (i) prohibited any purchases of the corporation's stock by an officer or director unless the

corporation first has the opportunity to make the purchase for its own treasury, (ii) provided that any officer or director who negotiated for the purchase of Persingers Inc. stock shall be deemed to be negotiating on behalf of the corporation, and (iii) provided further that any officer or director who purchased shares without complying with the bylaw was conclusively deemed to have purchased such shares on behalf of Persingers Inc. (App. 383-388)

Meredith Persinger Removed From Board

At the same meeting, respondents Carmazzi, Morton, Wiles and Agee voted to reduce the number of directors from six (6) to five (5), resulting in Meredith Persinger's elimination as a director. (V.4, A1015) At the 1987 trial, Mr. Morton admitted that this was done to reduce the representation of the Persinger family on the board. (Trial Tr. dtd. 6/15 /87, pp. 84-85)

On October 30, 1986, Agee, on behalf of Bank One, advised Meredith Persinger that Bank One

would sell him the estate bloc for $275.00 per share and that the offer was good for 21 days. Meredith Persinger countered with an offer to buy the estate bloc for $265.00 per share. (Trial Tr. dtd. 6/15/87, p. 124) At the trial, Mr. Persinger testified that if he had come to terms with Bank One, he intended to offer the estate bloc back to Persingers Inc. for purchase as treasury shares. (Trial Tr. dtd. 6/15/87, pp. 124-125)

Carmazzi Hires Counsel of Persingers Inc.

In November 1986, respondents Carmazzi, Morton and Wiles decided to buy the John Persinger estate bloc personally in order to control Persingers Inc. (App. V.4, A1021) They hired Charles B. Stacy, Esq., Charleston, West Virginia, and his law firm (the "Spilman firm") to represent them in this matter. (V.4, A1251-1261) At the same time, Mr. Stacy was also serving as counsel for Persingers Inc. (V.4, A1228-1250) Respondents Carmazzi, Morton and

Wiles met with Mr. Agee who said Bank One would sell the estate bloc to them for a price of $275.00 per share or a total price of $1,537,800.00. (V.3, A861; V.4, A1021)

In November and December, 1986, Mr. Stacy and these respondents developed a plan to acquire Persingers Inc. The Spilman firm reviewed the bylaw limitations on acquisition of company stock by officers and directors, drafted an outline of alternatives for stock purchase and drafted a letter of intent offer to Bank One. (V.4, A1251-1255)

Carmazzi Group Agrees to Purchase Estate Block

On January 9, 1987, Carmazzi, Morton and Wiles entered into a written letter of intent agreement with Bank One through Agee to purchase the estate bloc for $275.00 per share subject to obtaining adequate financing (the "January 9, 1987 agreement"). This agreement ran for a period of 60 days, or until March 10, 1987, during which time Bank One agreed that it would

not enter into any other agreements with regard to the shares.

Throughout this time period, Carmazzi and Morton were officers of Persingers and together with Miles constituted a majority of Persingers Inc.'s board of directors. Agee was also a director (V.3, A902). Additionally, Carmazzi, Wiles, Morton and Agee each were aware of the bylaw which restricted the sale of stock to officers or directors of Persingers Inc. (V.3, A861; V.4, A1251-1255). There was no disclosure of this agreement to Thomas Persinger, the other director, or to Persingers Inc.'s other shareholders. (V.4, A1303-1304)

Financing Conditioned on Freeze Out

In January 1987, Carmazzi, Morton and Wiles also met with officials of National Bank of Commerce, Charleston, West Virginia ("NBofC") to obtain a loan for the purchase. (V.3, A948; V.4, A1303, 1305) NBofC required (i) personal guarantees from Carmazzi, Morton and Wiles and

(ii) acquisition of all of the outstanding stock of Persingers Inc. so that they could place liens on the corporation's assets, as well as the estate bloc, for their loan. (V.1, A10-11; V.3, A973; V.3, A955-956) Wiles and Morton decided that they did not want to go forward with the purchase of the estate bloc, but Carmazzi did. (V.3, A973-974; V.4, A1033)

Carmazzi had to circumvent the prohibitions contained in the bylaw, which he had already violated by the January 9, 1987 agreement to purchase the John Persinger estate bloc. He had to elevate the estate bloc from a 48% bloc to an absolute majority control bloc of Persingers Inc. (51% or better) to assure passage of a "cash-out" merger to eliminate all other shareholders so that NBofC could obtain a lien for its purchase loan to Carmazzi on all of Persingers Inc.'s assets, not merely the stock itself. (V.4, A1034-1036)

A plan had been developed by the Spilman

firm. (V.4, A1251-1261) As Agee admitted at the 1987 trial, two parts of the plan were (i) the repeal of the bylaw and (ii) the selective redemption of certain Persingers Inc. shareholders to convert the estate bloc from a 48% bloc to a 51% (or more) absolute majority bloc. (V.3, A872)

Carmazzi, with the support of Agee who wanted to secure the $275.00 price to Bank One for the estate bloc, would have the bylaw repealed at the 1987 annual shareholders meeting. Then, at the directors meeting to be held thereafter, Carmazzi would have the board of directors elevate the estate bloc from 48% to 52% by redeeming stock from selected shareholders. (V.3, A872, 912-913)

Next, Carmazzi would purchase the estate bloc with a loan for 100% of its purchase price ($1,537,800.00) from NBofC. Finally, Carmazzi would use the estate bloc to vote a merger of his shell company into Persingers Inc. Carmazzi's

ownership of the estate bloc would guarantee that the merger would be approved on his terms. The merger agreement would provide that all shareholders, other than Carmazzi, would be "cashed-out," and Persingers Inc. would become liable for Carmazzi's loan from NBofC. (V.4, A1034-1035)

Repeal of Corporate Opportunity Bylaws

On March 2, 1987, Carmazzi met Mr. Stacy, still serving as counsel for both Carmazzi and Persingers Inc., and confirmed that he would repeal the bylaw at the 1987 annual shareholders meeting to be held on March 7, 1987. (V.3, A959) At the 1987 trial, Mr. Carmazzi admitted on cross-examination that (i) he had discussed repeal of the bylaw with Mr. Stacy on the Monday or Tuesday before the 1987 annual meeting and (ii) that Mr. Stacy knew about the January 9, 1987 agreement, but (iii) denied that Mr. Stacy had counseled him in the preparation of the January 9, 1987 agreement. (V.3, A959-960)

No notice of the repeal of the bylaw was given to the shareholders. On February 16, 1987, Carmazzi had disseminated a notice of the 1987 annual shareholders meeting to be held on March 7, 1987, and represented that the directors anticipated two matters would come before the meeting: (i) fixing the number of directors for 1987, and (ii) electing the directors to serve for the year. (V.3, A1017-1018)

On Wednesday, March 4, 1987, despite his conference with Mr. Carmazzi on March 2, 1987, Mr. Stacy told Thomas Persinger that the only matters he knew would occur at the meeting of shareholders were the fixing of the number of and electing of directors. (Trial Tr. dtd. 6/15/87, pp. 134-136)

At the 1987 annual meeting, Morton moved, seconded by Agee, that the bylaw be repealed. Thomas Persinger objected to the motion to repeal the bylaw because no notice of the proposed repeal of the bylaw had been given to the

shareholders. (App. 297-298, ¶21)

These objections were disregarded. Carmazzi, Morton, Wiles and Agee, on behalf of Bank One, voted 7,890 shares and proxies for repeal of the bylaw. Thomas Persinger voted 3,544 shares and proxies against repeal. The motion was declared to be carried and the bylaw repealed. Of the 7,890 shares voted for repeal, 5,592 shares were the shares held by the John Persinger estate. These shares were subject to the bylaw because of the undisclosed January 9, 1987 agreement, which ran to March 10, 1987. Excluding the estate bloc, 1,298 shares were voted for repeal, while 3,544 shares were voted against repeal. (App. 267-272, Exhibit C)

The shareholders of Persingers Inc. were not notified or otherwise advised of the fact that: (i) repeal of the bylaw was on the agenda for the annual meeting of shareholders held March 7, 1987, (ii) four of the five directors had already signed an agreement in direct violation of the

bylaw (iii) or that Carmazzi intended to purchase the estate block pursuant to that agreement in violation of the bylaw, and (iv) repeal of the bylaw was a component part of Carmazzi's plan to take over Persingers Inc. (V.3, A 867-868, 872)

Selective Redemption of Shares

After the repeal of the bylaw , Carmazzi turned to the remaining task of elevating the estate bloc from 48% to 52% at the annual directors meeting that immediately followed. (V.3, A872) Upon the motion of Wiles, seconded by Morton, respondents Carmazzi, Morton, Wiles and Agee voted as directors to redeem 832 shares of Persingers Inc. stock from several shareholders who three months earlier had expressed an interest in selling their shares. When certain of these shareholders had sought redemption of their shares three months earlier, on December 16, 1986, the board of directors refused to selectively redeem their shares, stating it would be unfair to other shareholders

to carry out a non-prorata or selective redemption of shares. (V.3, A912-913)

The redemption price was $220.00 per share; the total cost of the redemption was $183,000.00. This selective redemption of shares reduced the total number of issued and outstanding shares of Persingers Inc. from 11,570 to 10,738.(App 267-272, Exhibit C); (V.3, A867-868, 911) As a result, the 5,592 shares of the estate bloc were converted from a 48% bloc to a 52% bloc.

These two steps positioned Carmazzi to accomplish the final step of his plan -- the acquisition of 100% of Persingers Inc. through a "cash-out" merger in which all other shareholders of Persingers Inc. would be eliminated. Immediately following the directors meeting, Carmazzi and Agee signed a new letter of intent for the purchase of the John Persinger estate bloc, which ran for another 60 days. (V.4, A1033)

On March 13, 1987, Carmazzi provided NBofC

with a written version of the plan to acquire Persingers Inc. (V.4, A1034-1036) That document makes no mention of the repeal of the bylaw but does list the selective redemption and the elevation of the estate block as its first steps.

On March 20, 1987, Carmazzi sent a letter to shareholders to report on the 1987 annual meetings. He did not disclose (i) the January 9, 1987 agreement; (ii) the repeal of bylaw 5.4; (iii) the selective redemption, or (iv) the March 7, 1987 agreement. (V.4, A1019)

The plan went to recite the next steps to be taken in carrying out the plan culminating in a cash-out merger whereby all shareholders of Persingers Inc. would be "forced to sell" at a $220.00 price. (V.4, A1035-1036)

Final Purchase of Estate Block

Having carried out the steps in his plan, Carmazzi closed his loan with NBofC on April 17, 1987, and, through Sales One, purchased the 5,592 shares of the John Persinger estate bloc with

NBofC's loan for $1,537,800.00. Carmazzi granted NBofC a security interest in the estate bloc to temporarily secure the loan and agreed to grant liens on substantially all of Persingers Inc.'s assets once the cash-out merger was consummated. (V.3, A955-956) He also noticed a special directors' meeting of Persingers Inc. for April 27, 1987 to consider his proposed merger. This notice was the first disclosure of Mr. Carmazzi's plan to acquire Persingers Inc. On April 17, 1987, Agee, having accomplished his goal of selling the estate bloc for $275.00 per share, resigned as a director of Persingers Inc. (V.3, A868-869; V.4, A1215)

Special Meeting to Consumate Merger

On April 27, 1987, a special meeting was held to (i) select a new director to replace Agee and (ii) consider and vote on a plan of merger between Sales One, Sales Two and Persingers Inc. (App. 311-312, ¶¶ 35 & 36).

Between April 22, 1987 and April 27, 1987,

Carmazzi, Morton, Wiles and Tantlinger met privately with Mr. Stacy and other members of the Spilman firm to discuss the proposed merger. Thomas Persinger was not notified of or invited to these meetings, and did not attend. (App. 312, ¶ 37; V.4, A1242-1244)

At the special directors meeting on April 27, 1987, Tantlinger was elected as a director to fill the vacancy caused by the resignation of Agee. (App. 311-312 ¶36) After Tantlinger was seated, the meeting turned to consideration of the merger.

Thomas Persinger made several proposals at the directors meeting, including that (i) that an investment banker be hired to opine on the fairness of the merger; and (ii) that the minority shareholders be represented by an independent negotiating committee. These proposals was rejected by Morton, Wiles and Tantlinger. (App. 267-272, Exhibit C)

Morton, Wiles and Tantlinger voted to

recommend the proposed merger to the Persingers Inc. shareholders on the exact terms proposed by Carmazzi. There was no counter-offer by these directors to the merger terms proposed by Carmazzi. Furthermore, there was no attempt to determine if others besides Carmazzi might have an interest in acquiring Persingers Inc. Director Thomas Persinger voted against recommending the merger to the shareholders. (App. 267-272, Exhibit C)

With Carmazzi then in control of the estate bloc (52%), it was a foregone conclusion that the merger would be approved by the shareholders, and it was on May 29, 1987. The shareholder vote was tallied as 7,302 shares voted for and 3,328 shares voted against the merger. Without the John Persinger estate bloc, however, the shareholder vote was 1,710 shares for the merger and 3,328 shares against the merger. (App. 267-272, Exhibit C); (V.4 A1037-1038)

PROCEEDINGS BELOW

On May 7, 1987, petitioner filed this action for a preliminary and permanent injunction or rescission of the merger in the District Court. (V.1, A10) As a result of petitioner's discovery, the January 9, 1987 agreement was finally disclosed. (V.3, A867-868; V.4, A1024-1026)

On May 21, 1987, upon completion of petitioner's case in chief, Carmazzi made an attempt to comply with the bylaw; Carmazzi and Sales One offered to sell the estate bloc to Persingers Inc. for the price of $275.00 by a written offer. (V.4, A1029) A special meeting of the board of directors of Persingers Inc. was called for May 27, 1987 to consider Carmazzi's offer. (V.4, A1032)

On May 26, 1987, petitioner and 1866 Holdings, Inc. made a written offer to Persingers Inc. (i) to purchase from it the 5,592 shares of the estate bloc for a cash price of $285.00 per

share and (ii) to purchase from all other Persingers Inc. shareholders choosing to sell up to 100% of their Persingers Inc. shares for a cash tender purchase price of $300.00 per share, with no shareholder being required to sell any shares. (V.4, A1027-1028)

Upon receipt of petitioner's offer, Carmazzi amended his outstanding offer by adding conditions which purported to prohibit the resale of the estate bloc by Persingers Inc. to petitioner or any member of the Persinger family. (V.4, A1030-1031) At the 1987 trial, Carmazzi admitted that the amendment was intended to prevent consideration and acceptance of petitioner's offer. (V.1, A394; V.3, A961-962)

Carmazzi's amendment was not resisted by Wiles, Morton or Tantlinger. Instead, these directors did not even consider petitioner's offer. (App. 319, ¶ 48) Thus, the minority shareholders of Persingers Inc. were deprived of

the option to either (i) remain as shareholders or (ii) receive $300.00 per share for as many shares as they wished to sell (in contrast to Carmazzi's "cash-out" price of $222.00 per share).

On May 29, 1987, the trial judge denied petitioner's request for a preliminary injunction and the merger was consummated. The consolidated trial on permanent injunction was then treated as one for rescission of the consummated merger and was completed on June 15, 1987. (App. 285-286)

The 1987 District Court Consolidated Trial

On May 19, 1987, petitioner's counts for preliminary injunction and permanent injunction of the merger were advanced and consolidated for trial pursuant to Federal Rules of Civil Procedure ("FRCP"), Rule 65(a)(2), by order of the trial judge. (App. 346-350) Petitioner's counts for conspiracy, fraud and conversion were not set for trial. This order was stipulated to by counsel for petitioner and by counsel for all

respondents except William F. Agee and Bank One, who were not parties to the action at that time.

The trial judge conducted evidentiary hearings on May 20, 21, 28 and 29, 1987 and June 15, 1987. After conclusion of trial on June 15, 1987, the parties filed briefs and proposed findings of fact and conclusions of law. On October 20, 1987, the trial judge heard oral argument of counsel on rescission. Thereupon, the trial judge took this issue under advisement.

On April 12, 1988, the trial judge granted petitioner's motion to add Agee and Bank One as defendants, but denied the petitioner's previously filed motion to certify the action as a class action. (App. 336-341) After their addition as defendants, neither respondent Agee nor Bank One moved to modify the May 19, 1987 trial order, or to re-open the 1987 trial.

On December 20, 1988, the trial judge conducted a hearing on petitioner's motion to enjoin Carmazzi's attempt to terminate Persingers

Inc.'s over-funded employee pension plan. At the hearing, the trial judge stated to counsel for Bank One that he intended to rule soon on the pending issue of rescission. (Tr. dtd. 12/20/88, pp. 34-35)

The 1988 Rescission Order, Findings of "Unconscionable" Conduct And Stay

On December 29, 1988, the trial judge entered his order rescinding the merger in accordance with a memorandum opinion to be later filed, entered on January 5, 1989 (collectively, "rescission order"). The trial judge stated that the repeal of Persingers Inc. bylaw sec. 5.4 was "violative of ethical standards and prudent business practices and should not be condoned," and stated further that "(i)t is unconscionable that the action taken by the stockholders and directors [respondents] should be approved." (App. 329-330)

The trial judge stayed operation of the rescission order to allow an appeal. (App. 330-331) None of the respondents made a motion for a new trial or a motion to alter or amend a judgment pursuant to Rule 59, F.R.C.P; all respondents appealed to the Court of Appeals.

1990 -- Dismissal of Respondents Appeal

On August 6, 1990, in a published, per curiam opinion (the "1990 opinion"), the Court of Appeals dismissed and remanded respondents' appeal. SouthEast Bank, N.A.; Joseph M. Persinger v. R. Frank Carmazzi, et al. (App. 255-266).

The Court of Appeals drew an inference as to the acts of respondents, i.e., "an inference is drawn that the improper acts of appellants commenced as early as January 1987, when Carmazzi, Wiles and Morton reached an agreement for an option to purchase 5592 shares (48 percent of the Persinger stock) formerly owned by John A. Persinger, ..." (App. 262-264).

1990-91 Proceedings Before The Trial Judge

On August 30, 1990, the trial judge ordered all parties to file their proposed plans to implement rescission. (App. 252-254) Petitioner's plan of rescission provided that:

(i) The estate bloc be delivered to the Persingers Inc. treasury to be held as treasury shares as required by the bylaw;

(ii) Shareholders who had been cashed-out of Persingers Inc. could rejoin Persingers Inc. by repaying to it the $222.00 per share that they had received in cancellation of their shares; and

(iii) Shareholders who wished to remain outside of, or sell all or a part of their shares in Persingers Inc. would receive $300.00 per share for any or all shares which they wished to sell.

Petitioner requested a hearing on his plan of rescission and hearings were scheduled by the trial judge in November 1990 and January 1991. No hearings were actually held, however.

Instead, on January 29, 1991, the trial judge entered an order referring the action to William E. Hamb, Esq., Charleston, West Virginia,

as Special Master pursuant to Rule 53 of the F.R.C.P.

On February 11, 1991, petitioner moved the trial judge to withdraw or vacate the reference to the Special Master. The respondents filed memoranda in opposition to petitioner's motion to withdraw the reference.

On July 23, 1991, citing "reasons appearing to the court," the trial judge transferred the action to the Honorable Charles H. Haden, II, Chief Judge of the District Court (the "successor judge"). As of the date of this transfer, petitioner's plan of rescission had been pending before the District Court without a hearing for more than eight months (10/26/90 - 7/23/91).

1991 -- Transfer of Case And Successor Judge's Entry, sua sponte and Without Notice or Opportunity to be Heard of Order Vacating Trial Findings As "Premature"

On December 11, 1991, as his first act in the case, the successor judge entered an order which (i) denied petitioner's motion for attorney

fees, (ii) denied petitioner's motion to implement rescission, (iii) granted petitioner's motion to withdraw or vacate the order of reference to the special master, and (iv) vacated the rescission order entered by the trial judge. (App. 242-245) This order (the "vacating order") was entered by the trial judge sua sponte and without notice or opportunity to petitioner to be heard thereon.

The successor judge recited certain "complaints" by Agee and Bank One about the 1987 consolidated trial procedure, (App. 243-244), neither Agee nor Bank One had filed post trial motions for relief for their complaints as required by Rule 7 and Rule 59 F.R.C.P.

On December 26, 1991 and January 30, 1992, petitioner filed a motion and supporting memorandum which requested the successor judge (i) to reconsider and set aside that portion of the vacating order that had vacated the rescission order, and (ii) to grant petitioner notice and an

opportunity to be heard thereon.

The successor judge did not grant petitioner an opportunity to be heard. On March 24, 1992, he entered a one (1) page order which denied petitioner's motion and ordered that the vacating order would remain in full force and effect. (App. 238)

1992 -- Successor Judge Enters Summary Judgment In Favor Of Respondents Despite Facts Proven At Trial and Adopted in Court of Appeals

On June 22, 1992, the successor judge granted summary judgment to the respondents against all counts of petitioner's complaint (the "1992 summary judgment"), including petitioner's counts for conspiracy, fraud and conversion which had not been tried under the May 19, 1987 trial consolidation order. (App. 117-141) On July 9, 1992, petitioner filed a timely notice of appeal to the Court of Appeals.

1993 -- The Court of Appeals Certification Order To the West Virginia Supreme Court Based On 1987 Trial Court Findings of Fact

On June 18, 1993 and August 18, 1993, the

Court of Appeals certified four (4) questions of law to the West Virginia Supreme Court. The Court of Appeals did not address the federal due process issues raised by the vacating order. (App. 55-116)

The 1994 Opinion Of The West Virginia Supreme Court Based on Facts In Conflict With Court of Appeals Statement of Facts

On February 17, 1994, the West Virginia Supreme Court issued its unanimous written opinion, authored by Justice Richard M. Neely, which concluded that there was "no showing that the minority shareholders were treated unfairly, that the defendants [respondents] acted improperly with regard to the minority shareholders or that the defendants [respondents] gained any particular advantage as a result of an improper use of their fiduciary position. (App. 10-54)

In its opinion, the West Virginia Supreme Court did not discuss the January 9, 1987 letter of intent agreement. (App. 10-54) The court

interjected a "fact" not found by the trial judge and not certified by the Court of Appeals, i.e., "it appears that Mr. Carmazzi, through his personal guarantee backing up the NBofC loan was willing to accept financial exposure in order to restore morale and end the disruption and strife caused by the Persinger Group." (App. 50) The 1993 certification order of the Court of Appeals, however, contained no statement of fact as to any morale problem, disruption or strife caused by the Persinger group. (App. 55-116)

On March 21, 1994, petitioner filed with the Court of Appeals a motion for relief notwithstanding the opinion of the West Virginia Supreme Court of Appeals, and supporting memorandum. On March 25, 1994, respondents filed their joint response.

1994 -- In Unpublished, One Paragraph, Opinion, Court of Appeals Affirms Summary Judgment Based on W.Va. Supreme Court Opinion

On June 29, 1994, the Court of Appeals issued its unpublished, per curiam opinion (the

"1994 opinion") which affirmed the 1992 summary judgment entered by the successor judge. (App. 5-9) The Court of Appeals stated "(t)he West Virginia Court's answers, see Persinger v. Carmazzi, 441 S.E.2d 646 (W.Va. 1994), confirm the correctness of the district court's judgment, and, therefore, we affirm." (App. 9) The Court of Appeals did not discuss the federal due process issues arising out of the successor judge's vacating order. (App. 5-9)

On July 11, 1994, petitioner filed his petition for rehearing and suggestion for rehearing en banc with the Court of Appeals. They were denied on July 26, 1994.

REASONS FOR GRANTING THE WRIT

I

IN VIEW OF THE FEDERAL CONSTITUTIONAL QUESTIONS PRESENTED BY THIS CASE, THE COURT OF APPEALS ABDICATED ITS DECISION MAKING RESPONSIBILITY BY ADOPTING, IN TOTO, THE FINDINGS OF THE WEST VIRGINIA SUPREME COURT

A.
THE DISTRICT COURT'S VACATING OF THE TRIAL COURT'S FINDINGS OF FACT AND CONCUSIONS OF LAW AS "PREMATURE", WITHOUT NOTICE OR AN OPPORTUNITY TO BE HEARD, DENIED PETITIONERS DUE PROCESS

Notice and an opportunity to be heard are fundamental elements of the due process of law guaranteed every citizen and litigant by the Fifth Amendment. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). The notice must inform the interested parties of the pending judicial action and must give them an opportunity to present their objections. Milliken v. Meyer, 311 U.S. 457 (1940). The opportunity to be heard must be granted at a time and in a manner which are meaningful. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

The vacating order entered by the successor judge on December 11, 1991 as his first act in the case violated both tenets of due process. The order was entered sua sponte; neither Agee nor Bank One had filed a written motion as required by F.R.C.P. 7(b)(1) to request relief for these "complaints."

The vacating order was entered without notice of any kind to petitioner that the rescission order entered nearly three (3) years earlier after trial was to be vacated, or that petitioner's plan of rescission, pending without a hearing before the District Court for more than a year (10/26/90 - 12/11/91), would be denied.[2]

The vacating order was entered without affording petitioner a hearing on its plan. No

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[2]Petitioner's motion to withdraw the reference to the special master entered on January 29, 1991, filed with the trial judge on February 11, 1991, obviously does not indicate "notice" of the vacating order, which would be entered by the successor judge ten (10) months later on December 11, 1991.

hearings thereon were actually held by either the trial judge or the successor judge.

Nor was petitioner given a hearing on the vacating order after its entry. Petitioner's motion and memorandum for reconsideration of the vacating order filed on December 17, 1991, and his supplemental memorandum filed on January 30, 1992, were denied by the successor judge without hearing on March 24, 1992. (App. 238).

The failure of the successor judge to give notice or grant a hearing has prejudiced petitioner. Petitioner had agreed to litigate his counts for preliminary injunction and for permanent injunction or rescission of the merger in a consolidated bench trial, pursuant to F.R.C.P. 65, more than four (4) years earlier. (App. 346-350). Based upon the trial evidence, the trial judge had granted petitioner his requested relief of rescission in 1988. (App. 285-331)

All respondents except Mr. Agee and Bank One

had agreed to the consolidated trial. (App. 346-350). After they were added as defendants in 1988, neither Agee nor Bank One moved to reopen the trial or to request a new trial, either before or after entry of the rescission order.

In its 1990 opinion, the Court of Appeals did not reverse the rescission order. The Court of Appeals did draw an inference that the "improper acts of the appellants [respondents] commenced as early as January 1987, ..." (App. 262-264) This was the January 9, 1987 letter of intent agreement.

Notwithstanding this direction by the Court of Appeals to the District Court to specify the method of rescission, petitioner was never given a hearing on his plan of rescission. It was denied without hearing by the successor judge. (App. 242-245)

Not only was this a per se denial of due process, but because petitioner was not given a hearing he could not make a record of his plan.

As a result, the "facts" certified by the Court of Appeals in 1993 to the W.Va. Supreme Court contained no reference to petitioner's plan of rescission. Having prevailed in the liability phase of the action from 1987-89, petitioner was literally cut off from completing the proof of his remedy, i.e., his plan of rescission, in 1990 and 1991.

The Court of Appeals has itself recognized that such treatment does not comport with due process, but inexplicably has not applied its own precedents to the actions of the successor judge. In Valtrol v. General Connectors Corp., 884 F.2d 149 (4th Cir. 1989), the Court of Appeals reversed the order of the district court judge who, sua sponte and without notice or opportunity to the prevailing plaintiff to be heard, had granted defendant a new trial on its counterclaim. 884 F.2d 149, 156. In Insurance Services of Beaufort, Incorporated v. The Aetna Casualty and Surety Company, 966 F.2d 847 (4th

Cir. 1992), the Court of Appeals held in a declaratory judgment action that the District Court's use of briefs alone to decide the issue of damages, without either a hearing or sufficient evidence in the record, was error of law. 966 F.2d 847, 853.

B.

THE FACTS PROVEN BY PETITIONER AT THE 1987 TRIAL UPON WHICH THE TRIAL JUDGE BASED HIS RESCISSION ORDER PRECLUDED ENTRY OF SUMMARY JUDGMENT FOR RESPONDENTS IN 1992

This Court has consistently stated that (i) summary judgment can be granted only if there is no genuine issue as to the material facts, Weinberger v. Hynson, Wescott & Dunning, Inc., 412 U.S. 609 (1973); and (ii) on such a motion the inferences to be drawn from the facts must be viewed in the light most favorable to the party opposing the motion. United States v. Diebold, Inc., 369 U.S. 654 (1962). In reviewing on certiorari a decision of a court of appeals affirming a district court's grant of summary

judgment against the plaintiff, this Court has held that it must accept the plaintiff's version of the facts because the district court was required to resolve all disputed facts in favor of the plaintiff. Bishop v. Wood, 426 U.S. 341 (1976).

In granting summary judgment to respondents in 1992 despite the facts proven by petitioner at the 1987 trial, the successor judge has clearly departed from the accepted use of summary judgment.

At the 1987 trial, petitioner proved a series of interrelated acts by respondents which the trial judge characterized as "violative of ethical standards" and which led him to conclude that "(i)t is unconscionable that the action taken by the stockholders and directors [respondents] should be approved." (App. 329-330). They included (i) the violation of Persinger's bylaw section 5.4 by the respondents' (Carmazzi, Morton, Wiles and Agee/Bank One) negotiation for

and execution of the January 9, 1987 letter of intent agreement for their personal purchase of the estate bloc; (ii) the nondisclosure of this agreement and the attendant right of Persingers Inc. to purchase the estate bloc during the term of the agreement, which ran for sixty (60) days from January 9, 1987 through March 10, 1987; (iii) the attempted repeal of the Persingers Inc. bylaw without notice before or after the fact and without disclosure of the agreement which violated Persingers Inc. bylaw sec. 5.4; (iv) the use of the estate bloc (at the time 48% of Persingers Inc. shares), which was itself subject to the bylaw because of the undisclosed January 9, 1987 letter of intent agreement, to vote the repeal of the bylaw without notice on March 7, 1987 at the annual stockholders' meeting; (v) the use of $183,000.00 of corporate funds to selectively redeem certain shareholders, after their redemption had been refused less than three months earlier as unfair to the other

shareholders, in order to convert the estate bloc to an absolute majority control (52%) bloc; (vi) Mr. Carmazzi's secret purchase of the John Persinger estate bloc in violation of the bylaw pursuant to a second undisclosed letter of intent agreement executed March 7, 1987; (vii) Mr. Carmazzi's attempt to block consideration of petitioner's more favorable purchase offer dated May 26, 1987, by Mr. Carmazzi's amendment dated May 27, 1987 to his prior undated sales offer, which amendment purported to restrict the resale of the estate bloc by Persingers Inc. to petitioner or any member of his family; (viii) the acquiescence of respondents Morton, Wiles and Tantlinger in Mr. Carmazzi's attempt to block petitioner's offer and their concerted failure to consider and act upon petitioner's higher offer; culminating in (ix) Mr. Carmazzi's use of the estate bloc to vote a "cash-out" merger of Persingers Inc. in which all other shareholders were eliminated and he gained more than

$1,000,000.00 of Persingers Inc. equity and its entire business as a going concern. (App. 285-331)

There was no genuine issue as to any of these facts; petitioner had proven each of them. At the 1987 trial, respondent Agee admitted on cross-examination that the repeal of the bylaw and the selective redemption were "part and parcel" of Mr. Carmazzi's plan to "buy" the company. (V.3, A872) At trial, Mr. Carmazzi himself admitted that his May 27, 1987 amendment to his undated sales offer previously made on May 21, 1987 was intended to block consideration of petitioner's higher purchase offer dated May 26, 1992. (V.3, A961-962)

Without hearing any testimony, the successor judge ignored these proven facts and drew inferences which were contradicted by the respondents' own admissions at the trial.

The clear conflict of the 1992 summary judgment with this Court's decisions in

Weinberger v. Hynson, Wescott & Dunning, Inc., supra, and United States v. Diebold, supra, has not been addressed by the Court of Appeals in its 1994 opinion. Nor does the W.Va. Supreme Court opinion "confirm the correctness" of the successor judge (App. 9), because, like the successor judge, the W.Va. Supreme Court ignored the proven facts and trial admissions.

The W.Va. Supreme Court omits any reference to the January 9, 1987 letter of intent agreement. The omission of this fundamental fact fatally flaws its opinion.

Accordingly, this Court should grant its writ of certiorari to supervise and correct the departure of the successor judge from this Court's settled decisions on the proper use of summary judgment. Weinberger v. Hynson, Wescott & Dunning, Inc., supra, and United States v. Diebold, supra.

C.

IN VIEW OF THE SETTLED BODY OF FEDERAL AND WEST VIRGINIA LAW PROHIBITING CORPORATE FIDUCIARIES FROM APPROPRIATING CORPORATE OPPORTUNITIES FOR THEIR PERSONAL BENEFIT, AS WELL AS THE FEDERAL CONSTITUTIONAL DUE PROCESS QUESTIONS UNANSWERED IN THIS ACTION, THE COURT OF APPEALS IMPROPERLY ABDICATED ITS DECISION MAKING RESPONSIBILITY BY CERTIFYING QUESTIONS TO THE WEST VIRGINIA SUPREME COURT

While certification is a useful procedure to determine unclear questions of state law, Lehman Brothers v. Schein, 416 U.S. 386 (1974); Virginia v. American Booksellers Association, Inc., 484 U.S. 383 (1988), other courts of appeals have recognized that certification is inappropriate where the applicable state law is clear. Florida ex rel Sherin v. Exxon Corp., 526 F.2d 266, 276 (5th Cir. 1976); Bi-Rite Enterprises, Inc. v. Bruce Miner Co., 757 F.2d 440, 443 n. 3 (1st Cir. 1985); Tidler v. Eli Lilly and Co., 851 F.2d 418, 426 (Fed. Cir. 1988).

In Smith v. FCX, Inc., 744 F.2d 1378 (4th Cir. 1984), the Court of Appeals declined to certify questions of state law, even when

requested by one of the parties, where there was "ample state precedent" on a question. 744 F.2d 1378, 1379. The Court of Appeals has held that "discretion ought not be exercised to certify a question of state law where a question of federal law is present and undecided, the decision of which may be wholly dispositive of the case." Boyter v. Commissioner of Internal Revenue Service, 668 F.2d 1382, 1386 (4th Cir. 1981). The Court of Appeals has even disregarded the answers of the W.Va. Supreme Court where it had certified questions "without appreciating at the time that federal questions lurked in the case," Flannery v. United States, 718 F.2d 108, 110 (4th Cir. 1983), reasoning that "(w)e should have first addressed the federal questions lurking in the case." 718 F.2d 108, 110.

The established body of federal and West Virginia law on the fiduciary duties of majority shareholders, officers and directors prohibits them from appropriating corporate opportunities,

such as Persingers Inc.'s right under its bylaw to purchase the estate bloc pursuant to the January 9, 1987 letter of intent, for their personal benefit. Pepper v. Litton, 308 U.S. 295 (1939); Young v. Columbia Oil Co., 110 W.Va. 364, 370-371, 158 S.E. 678, 681 (W.Va. 1931); Hopkins v. Bryant, 121 W.Va. 748, 751, 6 S.E.2d 246, 248 (W.Va. 1939); Chounis v. Laing, 125 W.Va. 275, 288-290, 23 S.E.2d 628, 636 (W.Va. 1942). Majority shareholders cannot vote their own interests where their actions are wholly outside of the interest of the corporation and destructive of the interests of the minority shareholders. Thurmond et al. v. Paragon Colliery Co., 82 W.Va. 49, 53-54, 95 S.E. 816, 817-818 (W.Va. 1918). They are required to act with the utmost fair dealing and good faith towards the other shareholders. Masinter v. Webco Co., 164 W.Va. 241, 251-252, 262 S.E.2d 433, 440 (1981). A corporate director who solicits a shareholder to purchase his stock and

fails to disclose information not known to the shareholder that bears upon the potential increase in value of the shares shall be liable to the shareholder either to have the sale rescinded or to respond in damages. Bailey v. Vaughan, 178 W.Va. 371, 377, 359 S.E.2d 599, 605 (W.Va. 1987).

In light of Pepper v. Litton, supra, and these W.Va. precedents, certification by the Court of Appeals here was inappropriate. Tidler v. Eli Lilly and Co., supra; Smith v. FCX, Inc., supra. Applied to the acts of respondents proven at the 1987 trial, see II supra, and particularly the undisclosed January 9, 1987 letter of intent agreement among respondents in violation of Persingers Inc. bylaw sec. 5.4 (App. 322, ¶ 1 and 2), Pepper v. Litton and these W.Va. precedents remove the need for certification by the Court of Appeals.

II

THE FOURTH CIRCUIT'S OPINION DISCARDING THE BUSINESS PURPOSE DOCTRINE CONFLICTS WITH THE DECISIONS OF THIS COURT AND THE FIFTH AND ELEVENTH CIRCUITS

In Pepper v. Litton, 308 U.S. 295 (1939), this Court stated that a corporate director or majority shareholder "cannot use his power for his personal advantage and to the detriment of the stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements . . . Where there is a violation of these principles, equity will undo the wrong or intervene to prevent its consummation." 308 U.S. 295, 311.

In reliance upon Pepper v. Litton, supra, other courts of appeal have struck down transactions in which controlling shareholders, ostensibly in full compliance with the applicable corporation codes, have used their power for personal gain. Lebold v. Inland Steel Co., 125

F.2d 309 (7th Cir. 1942); Bryan v. Brock & Blevins Co., Inc., 490 F.2d 563 (5th Cir. 1974); Lewis v. Clark, 911 F.2d 1558 (11th Cir. 1990); contra, Nodak Bancorporation v. Clarke, 998 F.2d 1416 (8th Cir. 1993).

The acts of the respondents in carrying out the "cash-out" merger of Persingers Inc., through which all of the shareholders were eliminated and Mr. Carmazzi became its sole owner at a substantial personal gain, have flaunted the Pepper v. Litton, 308 U.S. 295, 310-311. The transaction can not be legitimized by its purported compliance with the technical provisions of the West Virginia corporation code, for even before Pepper v. Litton this Court stated definitively that the trusteeship of majority shareholders does not rest upon "technical distinctions." Southern Pacific Co. v. Bogert, 250 U.S. 482, 492 (1918).

The acts of the respondents proven at the 1987 trial, II supra, constitute a case study in

how to violate as many precepts of Pepper v. Litton, supra, as possible in a single transaction. Through the "cash-out" merger and its enabling steps, Mr. Carmazzi eliminated all other shareholders, and gained more than $1,000,000 of Persingers Inc. equity. (App. 331-322, ¶ 53)

CONCLUSION

A writ of certiorari should issue to review the judgment below.

Respectfully submitted,

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